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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF MICHIGAN, MICHIGAN PUBLIC SERVICE COMMISSION, WILLIAM E. LONG AND EDWYNA G. ANDERSON,

Petitioners,

v.

PANHANDLE EASTERN PIPE LINE COMPANY and NATIONAL STEEL CORPORATION,

Respondents.

STATE OF MICHIGAN AND MICHIGAN PUBLIC SERVICE COMMISSION,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

On Petitions for Writs of Certiorari to the United States Courts of Appeals for the Sixth and the District of Columbia Circuits

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BRIEF FOR PANHANDLE EASTERN PIPE LINE COMPANY IN OPPOSITION

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QUESTIONS PRESENTED

Whether the Natural Gas Act of 1938: (1) Confers exclusive jurisdiction upon the Federal Energy Regulatory Commission to authorize the transportation by an interstate pipeline of natural gas purchased by an industrial consumer in one state and delivered in another state; and (2) Preempts the state to which the gas is transported from requiring the interstate pipeline to obtain a state certificate in order to perform the service authorized by the federal agency.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1160

STATE OF MICHIGAN, MICHIGAN PUBLIC SERVICE COMMISSION, WILLIAM E. LONG AND EDWYNA G. ANDERSON,

Petitioners,

v.

PANHANDLE EASTERN PIPE LINE COMPANY and NATIONAL STEEL CORPORATION,

Respondents.

No. 89-1161

STATE OF MICHIGAN AND MICHIGAN PUBLIC SERVICE COMMISSION,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

On Petitions for Writs of Certiorari to the United States Courts of Appeals for the Sixth and the District of Columbia Circuits

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BRIEF FOR PANHANDLE EASTERN PIPE LINE COMPANY * IN OPPOSITION

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* Panhandle Eastern Pipe Line Company, a respondent herein, is a wholly-owned subsidiary of Panhandle Eastern Corporation, which is publicly-owned. Panhandle Eastern Corporation has only one affiliate that has publicly owned voting securities, TEPPCO Partners, LP.

OPINIONS BELOW

The petitions for writs of certiorari in No. 89-1160 and No. 89-1161 are integrally related. The petition in No. 89-1160 seeks review of a decision of the Sixth Circuit; the petition in No. 89-1161 seeks review of a decision of the District of Columbia Circuit. The opinion of the Sixth Circuit (Pet. App.[1] (89-1160) 1a-12a) is reported at 887 F.2d 1295; the opinion of the district court in that case (*id.*, 21a-41a) is reported at 689 F. Supp. 729. The opinion of the District of Columbia Circuit (Pet. App. (89-1161) 1a-17a) is reported at 883 F.2d 117; the agency orders in that case (*id.*, 22a-64a; 65a-86a; and 93a-221a (initial decision)) are reported at 42 F.E.R.C. ¶ 61,076; 40 F.E.R.C. ¶ 61,220; and 38 F.E.R.C ¶ 63,009, respectively.

JURISDICTION

In No. 89-1160, the judgment of the Sixth Circuit was entered on October 6, 1989, and a petition for rehearing was denied on November 3, 1989; the petition for a writ of certiorari was filed on January 24, 1990. In No. 89-1161, the judgment of the District of Columbia Circuit was entered on August 18, 1989, and a petition for rehearing and suggestion for rehearing *en banc* were denied on October 26, 1989; the petition for a writ of certiorari was filed on January 24, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The instant petitions for certiorari seek review of: (1) a decision of the District of Columbia Circuit affirming orders of the Federal Energy Regulatory Commission ("FERC" or "Commission") which granted authorization for the transportation of natural gas in interstate commerce from Oklahoma to Michigan and for the connecting

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[1] "Pet. App." refers to the appendices filed by petitioners in Nos. 89-1160 and 89-1161, respectively.

facilities; and (2) a decision of the Sixth Circuit affirming the judgment of a district court, which held that this action by FERC and the provisions of the Natural Gas Act preempted the regulatory authority of the State of Michigan over this transaction.

A. Statutory Background

The interstate natural gas industry is regulated by FERC, principally under the Natural Gas Act of 1938, 15 U.S.C. 717-717z. Section 1(b) of that Act, 15 U.S.C. 717(b), which establishes the scope of FERC's regulatory jurisdiction in this field, provides as follows:

> The provisions of this [Act] shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

In turn, Section 7 of the Natural Gas Act, 15 U.S.C. 717f, grants to FERC one of its chief substantive powers, namely the power to issue certificates of public convenience and necessity authorizing the construction, acquisition or operation of facilities for, among other things, the transportation of natural gas in interstate commerce, and the providing of interstate transportation service, and to authorize abandonment of any jurisdictional facilities or services.

B. The Facts of This Case

In this case, the Commission, acting pursuant to Section 7 of the Natural Gas Act, issued a certificate of public convenience and necessity authorizing respondent Panhandle Eastern Pipe Line Company ("Panhandle"), an interstate natural gas pipeline, to render a third-party

transportation service for respondent National Steel Corporation ("National Steel"), which operates a steel plant in Michigan. Specifically, FERC authorized Panhandle to transport gas from Oklahoma, where it is purchased by National Steel, to National Steel's plant site in Michigan, and to install delivery tap facilities to perform this service.

National Steel theretofore had received all of the gas supplies for its plant through the facilities of Michigan Consolidated Gas Company ("MichCon"), a local distribution company regulated by petitioner Michigan Public Service Commission, an agency of the State of Michigan (collectively, "MPSC"). MPSC, among others, took the position in the FERC proceedings that a state statute, Michigan Act 69 of the Public Acts of 1929 ("Act 69"), Mich. Comp. Laws 460.501-460.502 (Pet. App. (89-1160) 42a-44a), required Panhandle to obtain from the MPSC a *state* certificate of public convenience and necessity for this service to National Steel. It argued that the transaction was outside the FERC's jurisdiction.

FERC rejected the MPSC's position, concluding that it had exclusive jurisdiction over all aspects of the proposed transportation and delivery of gas by Panhandle. Pet. App. (89-1161) 50a-55a. FERC found on the evidentiary record that the public convenience and necessity supported the transaction, and issued a certificate to Panhandle for these services. On judicial review of FERC's orders, the District of Columbia Circuit affirmed, both on the merits of FERC's decision and on its finding of jurisdiction. *Id.* at 8a-10a. That court found it unnecessary to reach the question whether FERC's orders preempted the authority of the MPSC under Michigan Act 69. *Id.* at 10a.

The district court in Michigan, however, found that the FERC-issued certificate does preempt the MPSC from enforcing Act 69 against Panhandle, concluding that FERC's authority encompassed both the transportation of

gas and its ultimate delivery by Panhandle to National Steel. Pet. App. (89-1160) 21a-39a. The Sixth Circuit affirmed in a thorough opinion. *Id.* at 1a-12a.

In this Court, the MPSC does not challenge the correctness of FERC's orders on the merit of Panhandle's request for a certificate to transport and deliver gas to National Steel's plant, but seeks review only on the jurisdictional question.

ARGUMENT

The District of Columbia Circuit found in a well-reasoned opinion that delivery by an interstate pipeline of natural gas from a supply source in one state to an industrial consumer in another state constitutes an inseparable part of interstate transportation, which plainly falls within FERC's exclusive jurisdiction under the Natural Gas Act. In turn, the Sixth Circuit found in an equally well-reasoned opinion that there is no room under the federal statutory framework for potentially conflicting state regulation of precisely the same deliveries. These decisions do not conflict with any decision of this Court or any other court of appeals. Review by this Court is not warranted.

1. The courts below properly rejected the MPSC's claim that the *deliveries* of gas by Panhandle to National Steel should be regarded as distinct from the *interstate transportation* of this gas from Oklahoma to Michigan, and separately regulated by the MPSC as "local distribution."

a. Initially, the District of Columbia Circuit correctly held that the delivery of gas by an interstate pipeline to an industrial consumer falls within the "interstate transportation" of gas regulated exclusively by FERC. That such deliveries constitute interstate transportation and not local distribution is well settled by the decisions of this Court and other courts. Thus, for example, in *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972), the

Court held that FERC's predecessor, the Federal Power Commission ("FPC"), had the authority by virtue of its jurisdiction over interstate transportation to order the curtailment of deliveries by an interstate pipeline to an industrial consumer during a period of shortages, as a means of conserving scarce gas supplies for higher-priority residential and commercial consumers. Section 1(b), the Court found, preserved state jurisdiction only over the rates for *sales* of gas by the pipeline to industrial consumers; all other aspects of such service by the pipeline came under "the broad base of 'transportation' jurisdiction granted the FPC." 406 U.S. at 640. *Accord FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 (1961) (affirming Commission jurisdiction over transportation and delivery of third-party gas by an interstate pipeline); *see also Maryland* v. *Louisiana*, 451 U.S. 725, 755 (1981) (concluding that "[g]as crossing a state line at any stage of its movement to the ultimate consumer is in interstate commerce during the entire journey"); *United Gas Pipe Line Co.* v. *FPC*, 385 U.S. 83, 89 (1966) (Section 1(b) "gives the Commission jurisdiction over interstate transportation of natural gas as a separate and distinct matter, whether the transportation is for hire or for sale and whether the sale is for consumption or resale"); *International Paper Co.* v. *FPC*, 438 F.2d 1349, 1355 (2d Cir.), *cert. denied*, 404 U.S. 827 (1971) (holding that federal transportation jurisdiction under Section 1(b) encompasses interstate transportation by an industrial consumer of its own gas through its own pipeline).

It follows, then, that Panhandle's delivery of gas to National Steel cannot be said to constitute "local distribution" subject to state regulation. As this Court has explained, "what Congress must have meant by 'facilities' for 'local distribution' was equipment for distributing gas among consumers within a particular local community, not the high-pressure pipe lines transporting the gas to the local mains." *FPC* v. *East Ohio Gas Co.*, 338 U.S. 464, 469-470 (1950). Under this settled interpretation of Sec-

tion 1(b), the taps and related facilities connecting Panhandle's high-pressure interstate pipeline to the National Steel plant are not "local mains," and the delivery of gas through such facilities, therefore, is not "local distribution" within the meaning of Section 1(b).

On the contrary, these facilities plainly fall within FERC's exclusive jurisdiction over interstate pipeline facilities and operations. By asserting jurisdiction over these same facilities, the MPSC essentially seeks to have its own regulatory say over the FERC-approved transaction. Nor is there merit to the MPSC's claim of concurrent or sequential jurisdiction in this circumstance. *See National Fuel Gas Supply Corp.* v. *Public Serv. Comm'n*, 894 F.2d 571, 576-577 (2d Cir. 1990).

Moreover, the MPSC's claim would do violence to the entire structure of federal regulation. The act of "delivering" is an integral part of the transportation for wholesale customers, or the sale for resale to such customers. It is well-settled under the Natural Gas Act that the states have no jurisdiction over the delivery of natural gas by an interstate pipeline to a local distribution company for resale to the local distribution company's retail customers. *E.g., Illinois Natural Gas Co.* v. *Central Illinois Public Serv. Co.*, 314 U.S. 498 (1942). Since these transactions involve the same "delivery" act as the transportation for an industrial customer, Petitioners' contention must fail. There is no basis in the statute for the MPSC's singular claim that the states should be deemed to have jurisdiction over a pipeline's transportation deliveries to an industrial consumer such as National Steel.

Thus, the District of Columbia Circuit was on exceptionally firm ground in affirming FERC's determination that deliveries of gas by Panhandle to National Steel are within FERC's exclusive jurisdiction over "interstate transportation" and do not at any point constitute the "local distribution" of gas within the meaning of Section 1(b). As the court aptly stated, "Panhandle's role under the arrangement is simply to transport National's gas

from one state to another across several intervening states. It is hardly conceivable that a transaction could fit more neatly into the category of 'transportation of natural gas in interstate commerce.'" Pet. App. (89-1161) 9a.

b. In this circumstance, the Sixth Circuit likewise correctly held that the FERC-issued certificate preempted the MPSC's authority under Michigan Act 69 to require that Panhandle obtain a state certificate of public convenience and necessity for its delivery of gas to National Steel. As the district court stated in the case below, FERC's plenary authority over interstate transportation extends "to the point of delivery and covers the facilities through which the gas is delivered." Pet. App. (89-1160) 25a (citations omitted).

Hence, the Sixth Circuit and the district court properly concluded that there is no point at which Panhandle's transportation and delivery of gas in this case can be said to bring Panhandle within the regulatory authority of the MPSC. As the court of appeals stated: "Were we to permit the MPSC to cancel the FERC's approval of the Panhandle-National Steel bypass, we would subordinate federal regulatory power to state regulatory power in the complete absence of authority to do so." Pet. App. (89-1160) 11a.

Moreover, as both the Sixth Circuit and the district court noted, the foregoing conclusion finds strong support in this Court's opinion in *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293 (1988), which recently rejected MPSC's attempt to assert jurisdiction over the issuance of securities by FERC-regulated interstate pipelines. The Court held the MPSC's authority preempted by the Natural Gas Act. Although the Act does not expressly authorize FERC to regulate such securities issuance, the Court in *Schneidewind* found that "the things [the MPSC's] regulation is directed at, the control of rates and facilities of natural gas companies, are precisely the things over which FERC has comprehensive authority." 485 U.S. at 308. In the instant case, the MPSC's claim of authority falls even

more squarely in the federal domain, since it directly seeks to regulate interstate transportation, which is expressly within the statutory grant of authority to FERC.[2]

c. The MPSC asserts that this case presents issues of importance to Michigan ratepayers because of what it terms the "bypass" of MichCon's facilities by Panhandle. Pet. (89-1160) 5-6; Pet. (89-1161) 6-7. Both the MPSC and MichCon, however, had ample opportunity, which they exercised, in extensive hearings before the administrative agency to present evidence and arguments on the local impact of Panhandle's proposed deliveries of gas to National Steel. Thus, the local impact question was fully aired before the FERC. On the basis of the record as a whole, both the administrative law judge and the Commission found that the public convenience and necessity warranted the authorization requested by Panhandle, and the District of Columbia Circuit affirmed such findings on the merits. The MPSC's claim of jurisdiction overlooks Justice Black's admonition in the *East Ohio* case that "[r]egardless of whether it might have been wiser and more farseeing statesmanship for Congress to have [permitted

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[2] Nor does this Court's opinion of last term in *Northwest Central Pipeline Corp.* v. *State Corporation Comm'n*, —— U.S. ——, 109 S.Ct. 1262 (1989), support the MPSC's claim of jurisdiction here. That case concerned the validity of a state conservation agency order that cancelled after a certain time the right of any natural gas producer to make up in a later period the amounts by which it under-produced from its wells under the state's proration rules in earlier periods. FERC in that instance supported the state's view that its order did not interfere with the federal scheme of regulation of interstate pipelines, although the pipelines' ability to purchase gas and the price of such purchases admittedly was affected. The Court agreed, distinguishing its previous decisions in *Transcontinental Gas Pipe Line Corp.* v. *State Oil & Gas Board*, 474 U.S. 409 (1986), and *Northern Natural Gas Co.* v. *State Corporation Comm'n*, 372 U.S. 84 (1963), which held similar state orders to be preempted when directed at interstate pipeline purchasers rather than at producers. Here, too, the MPSC seeks to regulate the interstate pipeline itself, and so this case is more akin to *Transcontinental* and *Northern Natural* than to *Northwest Central*.

state jurisdiction in this circumstance], we should not do so through the interpretative process." 338 U.S. at 474.

2. Finally, the decisions of the courts below do not conflict with this Court's decisions in *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Serv. Comm'n*, 341 U.S. 329 (1951), or *Panhandle Eastern Pipe Line Co.* v. *Public Serv. Comm'n of Indiana*, 332 U.S. 507 (1947), as the MPSC alleges (Pet. (89-1161) 9-13). Those cases involved Commerce Clause challenges to state regulatory orders governing *sales* of gas by interstate pipelines to industrial consumers within the state. Here, in contrast, Panhandle makes no sales to National Steel, either in Michigan or elsewhere, but merely transports gas purchased by National Steel from a third-party producer in Oklahoma. Thus, the authority of the states over consumptive sales of gas within their borders simply is not presented in this case.

Moreover, as the Court expressly cautioned in both of the *Panhandle* cases (332 U.S. at 523; 341 U.S. at 336; *see also id.* at 338 (Frankfurter, J., dissenting) (quoting from the government's brief as *amicus curiae*)), there were in those cases no orders by FERC's predecessor, the Federal Power Commission, posing any conflict with the states' claims of authority. In the instant case, of course, FERC expressly authorized Panhandle's transportation and delivery of gas for National Steel, and in so doing specifically found that its jurisdiction was exclusive. *See* Pet. App. (89-1161) 54a-55a. Given this well-considered action by the agency charged by Congress with administering the Natural Gas Act, the MPSC's conflicting claim of authority plainly does not find support in the two *Panhandle* opinions of this Court.

CONCLUSION

For the foregoing reasons, the Court should deny the MPSC's petitions for writs of certiorari.

Respectfully submitted,

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